

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-018

JUNE TERM, 2006

In re N.T., Juvenile

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APPEALED FROM:

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Chittenden Family Court

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DOCKET NO. 45-1-04 Cnrv

Trial Judge: Thomas J. Devine

In the above-entitled cause, the Clerk will enter:

Mother appeals from the family court=s order terminating her residual parental rights in N.T. Father voluntarily relinquished his rights. Mother argues that an unauthorized protective order, issued by the family court in January 2004, tainted the events that led to the court=s termination decision. We affirm.

N.T. was born to mother and father in August 2002. He was operated on for a clubfoot in July 2003. Mother cancelled numerous follow-up medical appointments. The Department for Children and Families received a report that N.T. was at risk due to medical neglect, and it filed a petition alleging that N.T. was a child in need of care and supervision (CHINS). A preliminary hearing was held in January 2004. The family court

declined to place N.T. in DCF custody but it issued a protective order requiring mother to keep N.T.'s medical appointments and allow DCF to speak with N.T.'s doctors. The order also prohibited contact between mother and father and father and N.T. based on father's recent arrest for attempting to strangle mother. Mother agreed to abide by these restrictions at the hearing, and she accepted service of the protective order in writing.

Three days later, mother allegedly overdosed on drugs and was taken to the hospital. Several days after that, police responded to a domestic disturbance at mother's residence, and found father hiding in the bathroom. After an emergency hearing, N.T. was taken into temporary DCF custody and placed with his current foster mother. In May 2004, mother stipulated that N.T. was CHINS based on her violation of the January 2004 protective order and her ongoing substance abuse problems. DCF recommended that parents' rights be terminated but ultimately agreed to a three to six month concurrent plan for reunification. Under the terms of the amended disposition order, mother was required to engage in substance abuse treatment and become substance free, maintain stable employment and housing, and successfully complete the Lund Family Center's residential program, among other requirements. In October 2004, DCF filed a petition to terminate mother's residual parental rights.

On the first day of the termination hearing in April 2005, mother filed a motion to vacate the CHINS decision and the disposition order. Mother maintained that her admission that N.T. was CHINS was based in large part on her violation of the January 2004 protective order, and the protective order was void because it was not issued in accordance with 33 V.S.A. ' 5534. The court denied the motion, concluding that, although the order had not been issued in compliance with the statute, the record evidence and mother's admission at the hearing, amply supported the CHINS determination.

In December 2005, the court issued a lengthy order terminating mother's residual parental rights. It made the following findings. Mother was placed in State custody at age thirteen. She began using illegal drugs at age fourteen, and despite interventions by the State, her substance abuse problems deepened. In addition to marijuana, she began using benzodiazepine, OxyContin, and Percocet. Mother and father abused drugs together, and father physically abused mother on a regular basis. Mother became pregnant with N.T. at age

sixteen. In December 2003, father tried to strangle mother, and he was arrested and later convicted of this offense. N.T. was taken into custody in February 2004, and mother=s visits with him became sporadic. After a few weeks, the visits ceased altogether. DCF suspected that mother was abusing drugs and suspended visitation. Mother was evicted from her apartment. She did not attend the child=s medical appointments, and she continued to see father. Following the disposition hearing, mother resumed her visits with N.T. but she was slow to engage in many of the disposition plan recommendations. She was unable to refrain from substance abuse. She was unsuccessfully discharged from the Lund Family Center. She was convicted of several crimes and placed on probation. While one charge was pending, she was arrested for attempted prescription fraud, a felony. When mother failed to comply with even the most basic reporting requirements of probation, and lied about her whereabouts, her probation was revoked. She has been incarcerated since January 2005, and has committed numerous disciplinary infractions while incarcerated. At the time of the TPR hearing, mother had not seen N.T. since November 2004, and she faced continued supervision by DOC when released from prison, with the risk of reincarceration.

The court explained that N.T. had been with the same foster parent since February 2004 and he was thriving in her care. Based on these and numerous additional findings, the court concluded that mother had stagnated in her ability to care for N.T. and that the termination of her residual rights was in N.T.=s best interests. Mother appealed.

Mother argues that the court=s termination decision must be reversed because the issuance of the January 2004 protective order had a direct impact on her Adownward spiral.@ Mother maintains that her rights were terminated based on events that flowed from this order, and she asserts that she would not have made the CHINS admission but for the illegal protective order. According to mother, DCF did not give her a fair chance to parent N.T, despite her efforts to give him proper care.

When the termination of parental rights is sought, the trial court must conduct a two-step analysis. In re B.W., 162 Vt. 287, 291 (1994); 33 V.S.A. ' 5532(a). The court must first find that there has been a substantial change in material circumstances; second, the court must find that termination of parental rights is in

the child's best interests. In re B.W., 162 Vt. at 291. On appeal, we will affirm the trial court's findings unless they are clearly erroneous, and we will affirm its conclusion if supported by the findings. In re B.S., 166 Vt. 345, 350 (1997).

In this case, the evidence overwhelmingly supports the family court's decision to terminate mother's residual parental rights. While mother correctly asserts that the January 2004 protective order did not comply with the requirements of 33 V.S.A. ' 5534, there is no support for her assertion that As a result of this protective order, her rights would not have been terminated. Mother was represented by counsel, and she agreed to abide by the conditions of the protective order. She neither objected to nor appealed from this order. See In re D.C., 157 Vt. 659, 660 (1991) (mem.) (All issues, including those with constitutional dimensions, are waived by parties unless raised at the earliest opportunity.). Mother later admitted at the merits hearing that N.T. was CHINS. This admission was based not only on her violation of the protective order but also on her extensive substance abuse problems. At the CHINS hearing, mother testified that she had been smoking marijuana every day and taking Percocets about twice a week. She stated that she was basically high for a six month period. Mother did not appeal from the CHINS determination. The termination hearing was held approximately one year later. As reflected in the family court's unchallenged findings, mother failed to comply with the requirements of the disposition order. The court's findings support its conclusion that mother stagnated in her ability to parent N.T., and that termination of her parental rights was in the child's best interests. Mother, not DCF, is responsible for her parental shortcomings, and we reject her assertion that As a result of the issuance of the protective order, her rights would not have been terminated. Cf. In re B.H., 174 Vt. 554, 555-56 (2002) (mem.) (concluding that family court erred in considering validity of unappealed disposition order during TPR proceeding, and stating that family court should have accepted the unappealed order for what it was and considered SRS's petition to terminate father's parental rights in light of that order).

This case is not like In re T.L.S., 139 Vt. 197 (1980), on which mother relies. In that case, the family court ordered a parent to undergo a psychiatric examination in connection with a CHINS proceeding, over counsel's objection. On appeal, we held that the family court lacked statutory authority to order the examination, and concluded that all of the testimony derived from the examination should have been excluded.

Id. at 199. Because it was evident from the record and undisputed by the parties that without this evidence, the State could not sustain its case, we vacated the family court=s decision. Id. In this case, however, not only did mother fail to object to the terms of the protective order at the time it was issued but, as detailed above, the family court=s subsequent TPR decision is amply supported by evidence of mother=s stagnation and the best interest of the child.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice